BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 22, 1998
Case No: 98-INA-160

In the Matter of:

P & K GARMENT COMPANY
Employer

On Behalf of:

SHUN KI SZE
Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Appearance: Eugene C. Wong
San Francisco, California
For the Employer and Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

John C. Holmes
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. § 656.26 (1995) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to the Immigration and Nationality Act of 1990 ("Act"). 8 U.S.C. § 1182(a)(5) (1990). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the act, 8 U.S.C. § 1182(a)(5) (1990), and Title 20, Part 656 of the Code of Federal Regulations ("Regulations"). Unless otherwise noted, all the regulations cited in this decision refer to Title 20.

Under the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of the application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 6, 1994, P & K Garment Company ("Employer") applied for alien labor certification for Shun Ki Sze ("Sze"). The employer sought to fill the position of Bookkeeper. The description of the job as stated on the ETA-750 A is as follows:

> Keeps financial transactions records for garment manufacturer. Pays accounts payable, collects accounts receivable, prepares payroll. Compiles reports to show income and expenditures, and profits and losses. Prepares tax reports.

(AF 17). There was no advanced educational requirement for the position, although Employer required two years of experience and fluency in Cantonese.

On January 24, 1994, the Certifying Officer ("CO") issued a Notice of Findings ("NOF") which proposed to deny certification based on the rejection of a qualified U.S. worker, Angelina Yau ("Yau"). First, the CO found that Employer unlawfully rejected Yau on the basis of the two-year requirement. The CO stated:

> [A] B.S. in Accounting is equivalent to 2 years of [Specific Vocational Preparation ("SVP")] for either accountant or bookkeeper. Such background, by itself, qualifies the applicant for the job opportunity . . . When applicant's education and work experience as a Bookkeeper, accounting assistant . . . and junior accountant are considered together, the applicant [has] over five years of job related training, education, and experience. She is therefore qualified.

(AF 13) (citations omitted). Secondly, the CO found that Employer had utilized an undisclosed test to evaluate Yau's abilities. The test consisted of 22 short questions which required an explanation of certain accounting terms. In addition to the fact that the test was an undisclosed requirement, the CO found these other impairments:

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

> The test consists of short questions, which provide no context or direction to the person tested. The grading of the test seems to employ subjective and arbitrary criteria. The questions require answers in the form of definitions, so while the person being tested can provide a reasonable response, it is doubtful that s/he will answer such question exactly to the employer's expectation. This is an impossible burden for an applicant . . . While the [E]mployer has asserted 6 of the applicant's responses were incomplete, there is no objective measure for what constitutes complete.

(AF 14). The CO required the following corrective action:

> [1] The employer must document, with specificity, the lawful job-related reasons for rejecting the above-referenced U.S. worker [(Yau)] at the time of initial referral and consideration . . .
> [2] The employer must document, with specificity, that it engaged in good faith recruitment efforts toward the above-referenced U.S. worker at the time of initial referral and consideration.

(AF 14).

By letter dated September 5, 1996, Employer issued its rebuttal to the NOF. First, Employer argued that Yau did not have the requisite two years of full time experience as a bookkeeper. Employer stated that Yau's experience was gained as a result of part time and seasonal work. The employer alleged:

> In order to competently perform the duties and responsibilities of this position, the bookkeeper must possess skills and working knowledge, which is normally acquired throughout at least two years of working experience. Having less than two years experience would not be sufficient to employ as a bookkeeper.

(AF 09). Secondly, Employer took issue with the fact that Yau did not provide any employment reference letter and asserted that this is a valid reason for rejecting her. Lastly, Employer addressed the CO's findings concerning the accounting test. Employer argued that since Yau failed the test, in Employer's opinion, and did not demonstrate basic knowledge of accounting terms, Yau was rejected. (AF 10).

On September 12, 1996, the CO issued a Final Determination ("FD") which denied application for labor certification. (AF 04-08). The CO found that Employer failed to rebut the finding that (1) a U.S. worker with a B.S. in Accounting has an equivalent of two years SVP, (2) that the Employer's request for references prior to interviewing the applicant is unlawful under 656.24(b)(2)(ii), (3) Employer's request for educational credentials for a job that has no

educational requirement suggests that the recruitment is not in good faith, (4) Employer's test constitutes an undisclosed requirement since the job offer did not state that such a test would be used, and lastly, (5) the test was ". . . subjectively/arbitrarily graded . . ." and not shown to be a reliable or valid measure of the applicant's abilities.

Employer, October 16, 1996 appealed the CO's Final Determination. (AF 1-3).

DISCUSSION

We find that Employer has improperly utilized a test to evaluate U.S. applicant Yau and therefore do not reach the other issues presented.

Performance tests are not per se unlawful. A pre-employment questionnaire or test may be used to determine whether the applicant had the proper experience for the job. Sentient Sys., Inc., 94-INA-59 (Jan. 23, 1996); Mitco, 90-INA-295 (Sept. 11, 1991); Northwood Unocal 76, 89-INA-189 (July 9, 1991); South of France Restaurant, 89-INA-68 (Feb. 26, 1990); Allied Towing Serv., 88-INA-46 (Jan. 9, 1989). However, due to the potential for abuse of such tests, they are ". . . suspect and must be supported by specific facts which are sufficient to provide an objective, detailed basis for concluding that the applicant could not perform the core job duties." Lee & Family Leather Fashions, 93-INA-50 (Dec. 21, 1998).

The CO in Lee denied certification based on the use of the performance test since the employer could not demonstrate that the test was not ". . . excessive, restrictive or unrealistic."

In the instant matter, Employer has utilized a test which is highly subjective. This raises the potential for the abuses discussed in Lee. Employer did not in any of its submissions, provide adequate facts to demonstrate what its criterion was for marking an answer incorrect and furthermore how this test demonstrates whether the applicant can adequately perform the job. Other information that would have been useful would demonstrate that the employer gave this test to the alien and that the alien passed, or that other employees were required to take the same test before hire. None of this was provided. See, e.g., Northwood Unocal 76, 89-INA-189 (July 9, 1989) (denial was reversed where the employer demonstrated that all of its previous employees, including the alien, were required to take and pass the test before employment). Without this information it cannot be demonstrated that this test is a fair and accurate tool upon which to base the rejection of U.S. workers. We also note that the CO cited the example of Ms. Yau but that six other applicants may have been similarly unlawfully rejected.

ORDER

For the foregoing reasons, the Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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John C. Holmes
Administrative Law Judge

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